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8 Of Attorneys for Defendants

9
10 UNITED STATES BANKRUPTCY COURT
11 FOR THE DISTRICT OF OREGON

12 In re
13 Berjac of Oregon,
14 Debtor.

15 Thomas A. Huntsberger, Trustee of the
16 Chapter 7 Bankruptcy Estate of Berjac of
17 Oregon,

18 Plaintiff,

19 v.
20 Hutchinson, Cox, Coons, Orr & Sherlock
21 P.C. 401K Profit Sharing Plan,
22 Defendant.

Case No. 12-63884-tmr7

Adv. Proc. No. 14-06132-tmr

DEFENDANT'S ANSWER AND
AFFIRMATIVE DEFENSES

23 For its answer to Plaintiff Thomas A. Huntsberger, Trustee of the Chapter 7
24 Bankruptcy Estate of Berjac of Oregon's (the "Plaintiff") Complaint (the "Complaint")
25 herein, Defendant Hutchinson, Cox, Coons, Orr & Sherlock P.C. 401K Profit Sharing
26 Plan ("Defendant") admits, denies, and alleges as follows:

1.

2 With respect to Paragraph 1 of the Complaint, Defendant admits the court has
3 jurisdiction over this proceeding and that venue is appropriate in this judicial district.
4 Defendant is without sufficient knowledge or information sufficient to either admit or
5 deny the remaining allegations in Paragraph 1, and therefore denies the same.

6.

7 With respect to Paragraph 2 of the Complaint, Defendant admits that Berjac of
8 Oregon ("Debtor") filed a voluntary petition under Chapter 11 of the Bankruptcy Code
9 and that case was converted to one under Chapter 7. Defendant is without sufficient
10 knowledge or information sufficient to either admit or deny the remaining allegations in
11 Paragraph 2, and therefore deny the same.

12.

13 With respect to Paragraph 3 of the Complaint, Defendant admits that Plaintiff has
14 been appointed as the Chapter 7 Trustee, but lacks sufficient knowledge or information
15 sufficient to either admit or deny the remaining allegations in Paragraph 3, and therefore
16 denies the same.

17.

18 Defendant denies the allegations set forth in Paragraph 4 of the Complaint.

19.

20 With respect to Paragraph 5 of the Complaint, Defendant admits that Debtor
21 made transfers of property to Defendant on or within ninety (90) days prior to the
22 Petition Date. Defendant denies the remaining allegations contained in Paragraph 5.

23.

24 With respect to Paragraph 6 of the Complaint, Defendant incorporates by
25

1 reference the prior responses to the paragraphs re-alleged, and incorporate such
2 admissions and denials as if set forth in full.

3 7.

4 Defendant denies the allegations set forth in Paragraphs 7 and 8 of the Complaint.

5 8.

6 With respect to Paragraphs 9 and 10 of the Complaint, Defendant lacks sufficient
7 knowledge or information sufficient to either admit or deny the allegations, and
8 therefore denies the same.

9 9.

10 Defendant denies the allegations set forth in Paragraphs 11 and 12 of the
11 Complaint.

12 10.

13 With respect to Paragraph 13 of the Complaint, Defendant incorporates by
14 reference the prior responses to the paragraphs re-alleged, and incorporates such
15 admissions and denials as if set forth in full.

16 11.

17 Defendant denies the allegations set forth in Paragraph 14 of the Complaint.

18 12.

19 Unless expressly admitted above, Defendant denies each and every other
20 allegation of in the Complaint.

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22 //

23 //

24 //

25 //

AFFIRMATIVE DEFENSES

**FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)
(Fed. R. Bankr. Proc. 7012(b)(6))**

13.

The Plaintiff has failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE (Recoupment)

14.

Defendant is entitled to recoup deposits made into its investment account held by the Debtor against the Debtor's subsequent claims, as the claims arose out of the same transaction or occurrence.

**THIRD AFFIRMATIVE DEFENSE
(Set Off)
(11 U.S.C. § 553)**

15.

Defendant is entitled to set off from any monies to which Plaintiff may recover on behalf of the Debtor.

**FOURTH AFFIRMATIVE DEFENSE
(Contemporaneous Exchange for New Value)
(11 U.S.C. § 547(c)(1))**

16.

One or more of the payments made to Defendant was intended by the Debtor and Defendant to be contemporaneous exchanges for new value given by Defendant to the Debtor and were, in fact, substantially contemporaneous exchanges.

11

11

FIFTH AFFIRMATIVE DEFENSE (Ordinary Course) (11 U.S.C. § 547(c)(2))

17.

All payments Defendant received from Debtor were payments by Debtor to Defendant of a debt incurred by the Debtor in the ordinary course of business or financial affairs of the Debtor and Defendant.

18.

All payments Defendant received from Debtor were made by Debtor in the ordinary course of business or financial affairs of Debtor and Defendant or were made by Debtor according to ordinary business terms.

**SIXTH AFFIRMATIVE DEFENSE
(Mere Conduit)
(11 U.S.C. § 550(a))**

19.

At all time material herein, Defendant acted on behalf of the employees and former employees of Hutchinson, Cox, Coons, Orr & Sherlock, P.C., who are the account holders of Defendant.

20.

At all time material herein, Defendant lacked dominion over the funds received from Debtor and as a result, Defendant was a mere conduit of the funds and is not an initial transferee under 11 U.S.C §550(a).

* * * *

1 WHEREFORE, Defendant having fully responded to the Plaintiff's Complaint,
2 prays for judgment in its favor on Plaintiff's Complaint in its entirety, for costs and
3 disbursements incurred herein, and for such other and further relief as the Court deems
4 just and equitable.

5

6 DATED this 30th day of September, 2014.

7

8 HUTCHINSON, COX, COONS,
9 DUPRIEST, ORR & SHERLOCK, P.C.

10 By: /s/Thomas M. Orr
11 Thomas M. Orr, OSB #882824
12 Of Attorneys for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES upon Debtor and Debtor's attorney by causing to be deposited a true, exact, and complete copy thereof in the United States Post Office at Eugene, Oregon on September 30, 2014, enclosed in a sealed envelope, with postage prepaid and addressed to the following at the address stated below:

Berjac of Oregon
PO Box 40266
Eugene, OR 97404
Debtors

Keith Y. Boyd, Esq.
The Law Offices of Keith Y. Boyd
724 S. Central Avenue, Suite 106
Medford, OR 97501
ecf@boydlegal.net
Of Attorneys for Debtor

I hereby also certify that I served the foregoing DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES upon the attorneys for Plaintiff via ECF and by causing to be deposited a true, exact, and complete copy thereof in the United States Post Office at Eugene, Oregon on September 30, 2014, enclosed in a sealed envelope, with postage prepaid and addressed to the following at the address stated below:

Thomas A. Gerber, Esq.
Brent G. Summers, Esq.
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Of Attorneys for Plaintiff

By: /s/ Thomas M. Orr
Thomas M. Orr, OSB#882824
Of Attorneys for Defendants